1990

Emmanuel N. Onyeabor v. Pro Roofing Inc. : Brief in Opposition to Certiorari

Utah Supreme Court

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IN THE UTAH SUPREME COURT

EMMANUEL N. ONYEABOR,	:	
Plaintiff-Petitioner,	:	
v.	:	Supreme Court No. 900188
PRO ROOFING INC., a Utah corporation, and PAM BATES,	:	Case No. 87-0265-CA
Defendants-Respondents.	:	

OBJECTION TO PETITION FOR WRIT OF CERTIORARI FROM THE DECISION OF THE UTAH COURT OF APPEALS

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IN THE UTAH SUPREME COURT

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RULES

The defendants respectfully submit this brief in objection to plaintiff's Petition for Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the questions presented by petitioner are of the character and scope necessary to be considered by the Utah Supreme Court on Certiorari or whether they are unique to this case and fact specific, thus not entitling petitioner to a Writ of Certiorari under the provisions of Rule 43 of the Rules of the Utah Supreme Court.

2. Is an expert witness a surprise witness where:

(a) The expert withdraws as a witness because he perceives plaintiff's conduct as threatening his personal safety as well as the safety of his family; (b) After reassessing this risk, the expert changes his mind and agrees to testify, and notice is given to opposing counsel within ten days prior to trial as agreed by the parties and ordered by the court in the pretrial order; (c) A written report is prepared and delivered to plaintiff's counsel as requested by counsel during the hearing on the Motion in Limine and ordered by the court; (d) No objection was made by plaintiff's counsel when the expert is called to testify; (e) Plaintiff's counsel conducts an extensive cross examination in an area in which he is personally familiar; and (f) The expert is called to testify 22 days after plaintiff's counsel is given notice.

3. If the above-described expert is a surprise witness, did the decision by the Court of Appeals in this matter nullify or damage the Rules of Civil Procedure and the laws of discovery to

allow parties to spring surprise witnesses on opposing counsel immediately prior to trial and thereby prejudice opposing parties?

4. Do the facts of this case and its disposition at the Court of Appeals support plaintiff's attempt to have this Court modify the waiver doctrine?

CONTROLLING STATUTES

The controlling statutes are attached in the Addendum to this Brief as exhibit "A" and by reference made a part hereof.

STATEMENT OF THE CASE

Plaintiff filed an action in the Third Judicial District Court in and for Salt Lake County, Utah, alleging personal injuries resulting from a two-vehicle accident which occurred on June 15, 1984. Plaintiff alleged he suffered a "closed head brain injury" and a low back injury. The plaintiff was seeking damages in the amount of $1,152,498.79. (R. 145)

The action was the subject of a jury trial on February 2nd to February 17, 1987. The jury returned a verdict in favor of plaintiff finding that the defendant Bates was 75% at fault in the causing of the accident and determining that plaintiff had suffered damages totaling $16,850.00. The damages awarded to plaintiff were reduced by 25% by reason of the negligence attributed to plaintiff by the jury. (R. 658-660)

Plaintiff's motions for a new trial or for an additur were denied by the trial court. (R. 715)

Plaintiff appealed from the judgment on the jury verdict and from the order denying the motion for a new trial or for additur.

The Utah Court of Appeals affirmed in part and reversed in part. The court reversed the special verdict attributing 25% of the total negligence to the plaintiff, finding that the evidence did not support such a finding, and remanded the case for entry of judgment consistent therewith. (The case is reported at Onyeabor v. Pro Roofing, Inc., 787 P.2d 525 (Utah App. 1990)).

The Court of Appeals affirmed the lower court on all other issues. First, it rejected plaintiff's claim of judicial bias, finding as follows: 1) that the plaintiff never filed an affidavit as required by Rule 63(b) of the Utah Rules of Civil Procedure; 2) that the plaintiff failed to make contemporaneous objections to the court's comments. The Court of Appeals pointed out that, while reluctance to make frequent objections is understandable, the court could not find even one such contemporaneous objection on the record; 3) that plaintiff did not file a motion for a mistrial; and 4) that there was nothing to contradict the defendants' observations that the judge's remarks at issue were simply explanatory and for the purposes of clarification. (Onyeabor, 787 P.2d at 526-28.)

Second, the Court of Appeals decided that the plaintiff's claim that Dr. Clark was a surprise witness was without merit, finding that Dr. Clark had been identified 12 days before trial, that plaintiff's counsel was familiar with him, and that the subject matter and substance of his testimony was contained in a report delivered to plaintiff as required by the lower court. The Court of Appeals also found that, even if it was error to admit his testimony, the plaintiff was not prejudiced thereby.

(Id. at 528-29)

The plaintiff/petitioner, now petitions this Court for Writ of Certiorari on the issues of judicial bias and the admission of Dr. Clark's expert testimony.

STATEMENT OF FACTS

Comment on the evidence: In response to petitioner's assertion in his statement of facts that the judge made numerous prejudicial comments on the evidence and exhibited a prejudicial attitude toward the plaintiff and his counsel through the court's demeanor and conduct of the trial, the defendants assert that the comments at issue were appropriate and not prejudicial. Instead, many of the comments could be characterized as explanatory and others were made in an attempt to clarify the evidence elicited and limit it to those things which were relevant to the issues before the jury.

The latter was especially necessary as the case was tried on February 2, through February 17, 1987, for a total of 11 trial days. During the course of the trial, 33 witnesses testified; 20 of them as experts. Of the total witnesses, plaintiff called 26, of whom 15 were experts. Additionally, 108 of 113 offered exhibits were plaintiff's. One hundred six exhibits were admitted into evidence. Plaintiff's case in chief lasted from February 2nd until the morning of February 12, 1987. Virtually all of the testimony and exhibits sought to be admitted by plaintiff were admitted during the course of trial such that plaintiff's claims were fully and completely presented to the jury. Because the list of plaintiff's specific allegations with

regard to the claimed direct comments is so lengthy, the defendants have not included their responses to each in the body of this brief. Instead, for the Court's convenience and information, defendants' specific responses to each of the allegedly biased comments are included in the Addendum to this brief as Exhibit "B" and by reference made a part hereof.

Lincoln Clark, M.D. as a Witness: Defendants' amended witness and exhibit list containing Dr. Clark's name was filed and served on January 21, 1987. The proposed pretrial order signed by both counsel on November 6, 1986, (R. 228-248) provided that at least ten days prior to trial, each party would serve upon opposing counsel a list of all witnesses who would or might be called at trial. (R. 246). The order did provide the list should be mailed at least 13 days prior to trial to insure that opposing counsel would receive it at least 11 days prior to trial. Plaintiff's counsel acknowledges receiving that list on January 22, ten days prior to trial. (App. brief to the Court of Appeals pg. 80).

Defendants concede that at a hearing on December 5, 1986, Dr. Clark stated he would not testify in the action. At that hearing, Dr. Clark stated that after examining the plaintiff and based upon his professional experience, including testimony in major criminal and in several commitment hearings, the plaintiff constituted a threat to him, his family, to defendant Bates and to Dr. Thomas Houts and that Dr. Clark's appearance as a witness at trial opposing the plaintiff would place himself and his wife in physical jeopardy (T. S. 4-10; S 13-15). Subsequent events

caused Dr. Clark to determine that he could appear as a witness in the case without exposing himself to an unreasonable risk of harm. (T. L. 124-29). Plaintiff's counsel also perceived the potential risk of harm to Dr. Clark as is indicated by a series of questions and answers in which Mr. Sykes phoned a warning to Dr. Clark after receiving a phone call from plaintiff's wife. (T. L. 132-33).

The plaintiff's motion in limine to exclude Dr. Clark as a witness was heard by the trial judge on the Friday before trial, January 30, 1987. The judge concluded that if the defendants provided the plaintiff with a written report, he would permit Dr. Clark to testify. (T. Q. 49-50).

A copy of Dr. Clark's written report relating to his examination and evaluation of the plaintiff was delivered to plaintiff's counsel on Wednesday, February 4, 1987, at 9:30 a.m. Plaintiff's counsel did not thereafter attempt to depose or interview Dr. Clark. No objection was made by the plaintiff when Dr. Clark was called to testify on February 13, 1987, 22 days after plaintiff first received notice that Dr. Clark would testify.

At trial, plaintiff's counsel conducted a lengthy cross examination of Dr. Clark. A review of the transcript (Vol. L.) reveals the cross examination fills nearly 100 pages (compared to 44 pages for direct examination) and occupies substantially all of the afternoon session of February 13, 1987. During the course of cross examination, plaintiff's counsel tested the credibility of the witness utilizing Dr. Clark's transcribed

testimony taken during the trial of another closed head brain injury case in which both plaintiff's counsel and Dr. Clark were involved.

ARGUMENT

I

THE FACTS OF THIS CASE AND ITS DISPOSITION ON APPEAL DO NOT SUPPORT PLAINTIFF'S CLAIM THAT A REVIEW OF THE DOCTRINE OF WAIVER IS AN ISSUE OF SUFFICIENT CHARACTER AND SCOPE TO WARRANT CERTIORARI

The plaintiff seeks a Writ of Certiorari to review two issues decided by the Court of Appeals, and he seeks to establish that they are compelling issues which must be addressed by this Court as far reaching issues of procedure and policy. Quite simply, they are not.

In petitioner's first question presented for review, he seeks to have this Court reconsider the doctrine of waiver. He argues that an attorney should not be required to object to prejudicial comments and conduct by a trial judge where those comments and conduct are too numerous and too pervasive so as to make repeated objections prejudicial to that attorney's case. In support of his attempt to have this Court review the doctrine of waiver, the petitioner cites 35 specific examples of prejudicial comments by Judge Croft.

The petitioner then argues that the decision by the Court of Appeals that petitioner's claim of judicial bias was without merit was an excessively strict, inflexible application of the doctrine of waiver such as to warrant this Court's review.

The facts and the decision by the Court of Appeals do not

support petitioner's position.

Each of the specific comments and conduct singled out by the petitioner here were raised in and reviewed by the Court of Appeals. They include: 1) direct comments on the evidence; 2) sua sponte interjections by the trial judge; and 3) the demeanor and other non-verbal conduct of the trial judge. Rather than address each of these three classes individually and specifically at this time, the defendants shall limit their response to the issue of whether the decision by the Court of Appeals warrants review by this Court and is therefore of the magnitude to warrant certiorari. However, included in the Addendum hereto as Exhibit "B" is defendants' argument addressing each of the plaintiff's specific allegations as to judicial bias. To the extent necessary, it is incorporated by reference.

The petitioner's arguments as to judicial bias and the identical comments included by plaintiff in his Tables 1 and II were reviewed by the Utah Court of Appeals. The Court of Appeals dismissed the petitioner's claim of judicial bias as being without merit. However, contrary to plaintiff's assertions, this decision was based on several grounds, and not solely on plaintiff's failure to object to each. First, the petitioner failed to file an affidavit of bias as provided for in Rule 36(b) of the Utah Rules of Civil Procedure. While the Court of Appeals pointed out that this was not the sole infirmity of the petitioner's claim, it cited the case of Madsen v. Prudential Federal Savings & Loan, 767 P.2d 538 (Utah Ct. App. 1988) for the principle that motions to disqualify must be made promptly and

may not be delayed so as to appear that they are filed only when rulings are unfavorable. The Onyeabor panel of the court quoted the Madsen case and stated: "'Not only is such a tactic unfair, but it may evidence a belief that the judge is not in fact biased.'" (Onyeabor, 787 P.2d at 527 fn. 1, quoting Madsen, 767 P.2d at 542).

Specifically addressing the petitioner's claim now at issue before this Utah Supreme Court that counsel should not be expected to object to every prejudicial comment, the Court of Appeals noted that the petitioner had in fact objected to none! The Court of Appeals stated:

> Although reluctance to make frequent objections may be understandable, we fail to find in the portions of the record provided by plaintiff even one such contemporaneous objection. Nor can we find any motion made by plaintiff for a mistrial.

Onyeabor, 787 P.2d at 527.

In the Court of Appeals, as here, the petitioner had relied on the singular passage on day three of the trial where the trial judge explained that the petitioner had objected in chambers to his conduct. The Court of Appeals pointed out that the need to make a record applies to conferences in chambers as well as courtroom proceedings and that the burden was the plaintiff's to preserve the record for a possible appeal.

The Court of Appeals then addressed the lower court's comments on plaintiff's objection made in chambers, but the Court of Appeals cited the entire passage. The entire passage is important as it includes the trial judge's response to

> You have made mention of the fact . . . that some of your witnesses sitting in the courtroom told you that it was obvious that the judge didn't like you. Well, again if they got that impression, I'm sorry, because that isn't true. . . .
>
> But you go on in your brief stressing the fact that my conduct throughout the trial gave the jury a powerful message that your methods were time consuming, meaningless, perhaps an attempt to put something over on the jury. That surprised me. . . . And you suggest that my conduct, by the tone of my voice, by the shrug of my shoulders, by a sigh, gave a powerful message to the jury that I didn't think much of your case, and I was trying to hurry the case along and not willing to give you a fair shake. . . . The only way I can respond to that sort of indictment of the Court's conduct at the trial is by saying I plead not guilty. . . . I deny that throughout the trial I did things intentionally or unintentionally to discredit you or your witnesses or to the face of the jury.

Id. at 527. (emphasis added) Thus the court denied that its conduct was prejudicial on day three of the trial, and the petitioner never raised a subsequent objection in the remaining eight days of trial.

Finally, in dismissing petitioner's claim of judicial bias as being without merit, the Court of Appeals also relied on the fact that there was a jury instruction which cautioned the jurors that anything done or said by the judge during the trial should not be considered by the jurors as indicating the judge's view on any issue in the case. Specifically, Jury Instruction No. 2 stated as follows:

> Anything done or said by me during the trial should not be considered by you as indicating my view on any issue in this case. Any belief you may have as to what my view may be

should receive no consideration by you in your deliberations.

Therefore, the decision that the petitioner's claim was without merit was based on several grounds and a review of all comments in context of the entire record. Not only did the plaintiff's counsel fail to object to any comments on the record, he also failed to file an affidavit of prejudice as soon as it allegedly became apparent that the judge disliked the plaintiff and the plaintiff's case. The judge himself addressed plaintiff's concerns and denied all allegations of bias as well as instructing the jury to disregard any beliefs they had as to the judge's opinion of the case.

From the entire record, then, the Court of Appeals could only conclude that: "There is nothing to contradict defendants' observation that the questioned remarks were 'simply explanatory statements made by the Court either in the course of ruling on objections, or limiting the admissibility of evidence or testimony, or clarifying the testimony given by a witness.'" Id. at 528.

This conclusion and the dismissal of plaintiff's claim of bias was therefore not an inflexible and overly strict application of the doctrine of waiver as the petitioner would argue. It was, instead, a reasoned approach to the specific facts of this case and the plaintiff's claims on appeal. As a result, the plaintiff's claim that this Court must review the doctrine of waiver is not of the character and scope necessary for this Court to grant plaintiff's Writ of Certiorari. It

II

THE LOWER COURT DID NOT ABUSE ITS DISCRETION UNDER THE FACTS OF THIS CASE IN ALLOWING THE TESTIMONY OF THE DEFENDANTS' EXPERT, DR. LINCOLN CLARK, M.D. AS A RESULT, THE DECISION BY THE COURT OF APPEALS IN THIS REGARD DOES NOT LESSEN THE STANDARDS OF PRACTICE AMONG LITIGATING ATTORNEYS OR AFFECT THE PERCEIVED FAIRNESS OF THE SYSTEM. THEREFORE, THE ISSUE OF WHETHER DR. CLARK WAS A SURPRISE WITNESS IS NOT OF THE SCOPE AND CHARACTER NECESSARY FOR CERTIORARI

The petitioner's argument that the decision by the Court of Appeals sanctioning the lower court's refusal to exclude the testimony of Dr. Lincoln Clark as a surprise witness somehow lessens the standards of practice among litigating attorneys. To emphasize his point, the petitioner claims we might as well tear out certain pages of the Rules of Civil Procedure because the Court of Appeals is refusing to enforce them. Hardly.

The issue of exclusion of the testimony of a surprise witness is a fact-intensive issue on which a trial court has broad discretion. A decision will be overturned on appeal only for clear abuse of that discretion.

Rule 26(e)(1), Utah Rules of Civil Procedure provides:

> The party is under a duty seasonably to supplement his response with respect to any question directly addressed to . . . the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

Rule 51(a)(3), Utah Rules of Civil Procedure, allows the trial court to grant a new trial based on "accident or surprise, which ordinary prudence could not have guarded against."

The trial court has broad discretion in deciding whether or

not to exclude testimony or to grant a new trial based on an alleged surprise witness. Zakroff v. May, 8 Ariz. App. 101, 443 P.2d 916 (1968); Jensen v. Thomas, 570 P.2d 695 (Utah 1977) (a ruling on a motion for a new trial will be overturned only for a clear abuse of discretion).

In reviewing a trial court's use of such discretion, this Court has noted that, to overturn a trial court's ruling on a new trial requires a "clear transgression" of "reasonable bounds of discretion", and no such transgression exists where there is evidence to support the ruling. Lembach v. Cox, 639 P.2d 197, 202 (Utah 1981) rev'd on other grounds. See also, Sturdivant v. Yale-New Haven Hospital, 476 A.2d at 1077.

Beyond showing an abuse of discretion, the appellant must establish that he was prejudiced by the alleged "surprise" before the denial of a new trial will be overturned. See, Lembach, 639 P.2d 197. See also, Acosta v. Superior Court, 146 Ariz. 437, 706 P.2d 763 (1985).

The policy behind such rules is that the disclosure of the witnesses permits "the opposing party to prepare an effective cross-examination." Hoover v. United States Dept. of the Interior, 611 F.2d 1132, 1142 (5th Cir. 1980). Where this policy is not contravened, a so-called "surprise" witness has been allowed to testify. See, Zakroff v. May, 8 Ariz. App. 101, 443 P.2d 916 (1968) (testimony allowed where appellant was given opportunity to depose witness prior to testimony). See also, Macshara v. Garfield, 20 Utah 2d 152, 434 P.2d 756 (1967), rev'd on other grounds, Edwards v. Didericksen, 597 P.2d 1328

(Utah 1979) (not abuse to permit testimony not disclosed at pre-trial).

Plaintiff contends that Lincoln Clark, M.D., a psychiatrist called to testify on behalf of defendants, was a surprise witness whose testimony was prejudicial to plaintiff.

Conduct by plaintiff himself which was perceived by an experienced psychiatrist as threatening caused Dr. Clark to initially withdraw as an expert witness. Plaintiff's own counsel apparently perceived the threat as real as he called Dr. Clark to warn him of possible violence from plaintiff in an incident where plaintiff, in fact, appeared at the office of plaintiff's counsel and banged on counsel's desk with a cane. After reassessing the risk to his personal safety, Dr. Clark concluded that he could appear as a witness. Plaintiff was informed that Dr. Clark would be a witness more than ten days prior to trial. Dr. Clark's testimony did not occur until February 13, 1987, twenty-two days after plaintiff's counsel had notice that he would appear.

Plaintiff's motion in limine to exclude Dr. Clark as a witness was heard by the trial judge on the Friday before trial, January 30, 1987. At that time, Judge Croft indicated that he was inclined to permit Dr. Clark to testify and stated:

> [JUDGE CROFT]: I would say that if, during the course of the trial, you decide you want to call Dr. Clark then perhaps an opportunity for Mr. Sykes to interview him might be granted.
>
> MR. STEGALL: Okay. I would certainly be willing to inquire of Dr. Clark as to whether he could put together a written report prior to Monday or Tuesday. I don't know how

> feasible that is but I will certainly so inquire and if one can be prepared --
>
> JUDGE CROFT: One might say if he is going to testify then tell him we want a written report for the attorneys to have a look at.
>
> MR. SYKES: That's the least we should have, is a written report.
>
> JUDGE CROFT: So if you want to agree to try to get together to dictate a report and have it available to you Monday or Tuesday so you will both have it then I would say if you went to call him, why, I would permit him to do so.

(T. Q49-50.)

A copy of Dr. Clark's written report relating to his examination and evaluation of plaintiff was delivered to plaintiff's counsel on Wednesday, February 4, 1987, at 9:30 a.m. Plaintiff's counsel did not thereafter attempt to depose or interview Dr. Clark. No objection was made by plaintiff when Dr. Clark was called to testify on February 13, 1987.

At trial, plaintiff's counsel conducted an able, aggressive and lengthy cross-examination of Dr. Clark. During the course of cross-examination, plaintiff's counsel tested the credibility of the witness utilizing Dr. Clark's transcribed testimony taken during the trial of another closed-head brain injury case in which both plaintiff's counsel and Dr. Clark were involved.

Plaintiff was not prejudiced by the refusal of the trial court to exclude Dr. Clark as a witness. The witness's earlier withdrawal had been caused by plaintiff's own conduct. A seven page single-spaced typed report of the witness' examination and findings were furnished to plaintiff's counsel substantially in

advance of the witness's testimony. Plaintiff's counsel had had the opportunity to test the demeanor, credentials and expertise of the witness in a prior legal proceeding. A cross examination performed by plaintiff's counsel reveals counsel's own substantial expertise in the field of brain injury which permitted him to make a full and informative cross-examination of the witness.

Upon review the Court of Appeals found that the petitioner's claim that Dr. Clark was a surprise witness was without merit. The Court of Appeals found that the defendants had substantially complied with Rule 26(e)(1) of the Utah Rules of Civil Procedure. The Court pointed out that Dr. Clark was identified twelve days before trial and that plaintiff's counsel was familiar with him from his testimony in other lawsuits. In addition, the Court noted that the subject matter and substance of the expert testimony was contained in the report delivered to plaintiff nine days before the doctor testified. Finally, the Court of Appeals found that the petitioner had failed to demonstrate how he was prejudiced, and absent prejudice and an adverse affect on the substantial rights of the parties, any error in the admission of evidence must be disregarded.

The petitioner's attempt to categorize this decision as a crisis of procedure warranting certiorari is instead an attempt to have this Court decide whether, under the facts of this case, the lower court abused its discretion. Such an appellate review is case and fact specific and does not warrant certiorari.

In support of his contention that courts generally refuse to

allow surprise experts to testify in similar situations, the petitioner cites the case of DeMarines v. KLM Royal Dutch Airlines, 433 F.Supp. 1047 (E.D. Pa. 1977). In that case the defendant in an airline decompression case called a doctor to testify that petitioner's condition resulted from pre-existing causes. The plaintiff's counsel objected to the testimony on the grounds that he had no prior notice of the witness and on the grounds that the report furnished to him by the doctor did not contain any diagnosis as to pre-existing causes. The petitioner in this case points out that the trial judge excluded the testimony.

However, this exclusion by the trial judge was overruled on appeal to the United States Court of Appeals for the Third Circuit in the case of DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (1978). In the appellate case, KLM asserted that the district court erred in excluding this expert's medical testimony. In reviewing the issue on appeal, the Third Circuit began by outlining the applicable standard of review and stated:

> The applicable standard of review to determine whether the district court abused its discretion in excluding testimony for failure to comply with pre-trial notice requirements was recently stated by the court in Meyers v. Penny Pack Woods, 559 F.2d 894 (3rd Cir. 1977). In that case, this court reversed the district court's refusal to admit testimony of a witness not named in a pre-trial memoranda on the basis of four factors:
>
> 1. the prejudice or surprise in fact of the party against whom excluded witnesses would have testified;

2. the ability of that party to cure the prejudice;

3. the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court;

4. bad faith or willfulness in failing to comply with the court's order.'

Id. at 904. Additionally, we noted the significance of the practical importance of the evidence excluded. Id. at 905. Examining the facts of this case in the light of our standard of review, we hold that the expert testimony should not have been excluded. It may be that KLM did not perform precisely to the pre-trial notice requirements, and we are sensitive to the district court's need to maintain control over the discovery process and a fair, orderly presentation of evidence. Yet, exclusion of evidence is a drastic sanction, which must pass the strict Meyers test to be upheld.

In the instant case, KLM's pleading and the pre-trial order giving notice that pre-existing medical infirmities would be part of the case gives little support to plaintiff's contention of surprise and prejudice. And even if plaintiff's counsel were surprised by who gave the testimony, he should not have been surprised by its substance. Further, Dr. Welch's testimony occasioned no disruption in the trial, nor was there any assertion that the defendant exercised bad faith. In view of these facts, and because of the critical importance of this evidence to defendant's case, we are constrained to hold that the district court's exclusion of Dr. Welch's testimony as to pre-existing medical infirmities was reversible error.

Id. at 1201. (emphasis added and in original)

Applying these principals to the case currently before this Court on Petition, not only is it clear that the lower court did

not abuse its discretion, it is clear that the decision by the Court of Appeals has not rendered a drastic departure from the evidentiary and procedural law regarding surprise witnesses. Dr. Clark was included in the pre-trial notice, and the plaintiff received that notice ten days before trial as required by the pre-trial order. A report was delivered to the plaintiff which outlined the Doctor's testimony on the third day of trial, nine days before Dr. Clark was to testify. Viewing the entire factual scenario, the plaintiff had notice that Dr. Clark was to testify 22 days before he did so. Although now the petitioner claims on page 23 of his petition that Dr. Clark's reappearance was "obviously concealed from the petitioner," there is no evidence to support such a bare allegation of bad faith, and the defendants did not act in bad faith. The basis for Dr. Clark's reappearance was his reassessment of the situation and his determination that despite Mr. Onyeabor's conduct, he was not in personal risk.

Finally, the petitioner seeks to have this Court redetermine whether or not he was prejudiced by the testimony of Dr. Clark, and he argues that he was prejudiced by: 1) defendants' failure to provide a timely report; 2) inability to obtain a deposition; 3) petitioner's contention that the report failed to state a conclusion; and 4) inadequate cross examination. Plaintiff's arguments as to prejudice caused by the testimony of Dr. Clark are unsubstantiated allegations and generalities. The petitioner's argument does not address just how he was prejudiced

or how the outcome of the case was affected. General statements that evidence prejudiced a party are insufficient to establish such a conclusion in the absence of a showing that the outcome of the case was somehow affected thereby.

Thus, once again, viewing the facts surrounding the decision on this issue in the lower court and the disposition of the issue in the Court of Appeals, it is clear that this is an ordinary case. The decision by the Court of Appeals cannot be viewed as drastically affecting established procedure and fairness in ongoing litigation or even as a drastic departure from the rules as they apply to this case. Therefore, pursuant to Rule 43 of the Rules of the Utah Supreme Court, this issue does not represent an issue of the character and scope necessary for certiorari. Therefore, the petition should be denied.

CONCLUSION

The issues presented by the plaintiff, when viewed in the light of the facts in this case and the entirety of the decision by the Court of Appeals, are not of the character and scope necessary to grant certiorari under Rule 43 of the Rules of the Utah Supreme Court.

Therefore the petition should be denied.

Respectfully submitted this 22nd day of June, 1990.

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Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 1990, I caused to be hand delivered four copies of the foregoing Objection to Petition for Writ of Certiorari From the Decision of the Utah Court of Appeals to:

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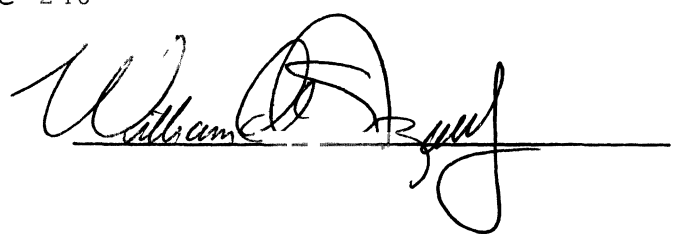

ADDENDUM

EXHIBIT "A"

CONTROLLING STATUTES

1. Rule 43, Rules of the Utah Supreme Court

Rule 43. Considerations governing review of certiorari.

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor wholly measuring the court's discretion, indicate the character of reasons that will be considered:

(1) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(2) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of this Court;

(3) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision; or

(4) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by this Court.

2. Rule 63, Utah Rules of Civil Procedure

Rule 63. Disability or Disqualification of a Judge.

. . .

(b) Disqualification. Whenever a party to any action or proceeding, civil or

criminal, or his attorney shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judgment shall proceed no further therein, except to call in another judge to hear and determine the matter.

3. Rule 26(e)(1), Utah Rules of Civil Procedure

Rule 26. General provisions governing discovery.

. . .

(e) Supplementation of responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

4. Rule 59, Utah Rules of Civil Procedure

Rule 59. New trials; amendments of judgment.

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; . . .

. . .

(3) Accident or surprise, which ordinary prudence could not have guarded against.

EXHIBIT "B"

ARGUMENT

THE PLAINTIFF WAS NOT PREJUDICED BY ANY CONDUCT OF THE TRIAL JUDGE

Addressing the specific conduct and individual comments singled out by petitioner as the basis for his argument that the judge was prejudiced and biased against him, the conduct and comments can be separated into four categories. They include:

1. Direct comments on the evidence;

2. Sua sponte interjections by the trial judge; and

3. The demeanor and other non-verbal conduct of the trial judge.

Each of these categories and the specific conduct at issue is addressed specifically below. In general, the defendants submit that the conduct and comments of the trial court were appropriate and not prejudicial.

CLAIMED DIRECT COMMENTS

Plaintiff claims that on fourteen occasions during the course of the trial, the trial judge made direct comments upon the evidence. The portions of the trial transcript containing the claimed comments are designated items 1 through 14 in the Appendix to plaintiff's brief.

A review of those portions of the transcript itself (rather than plaintiff's "tables") reveal that virtually all of the instances cited by plaintiff are not comments on the evidence but are simply explanatory statements made by the court either in the

course of ruling on objections, or limiting the admissibility of evidence or testimony, or clarifying the testimony given by a witness. Instances falling within this category are Table 1 and Appendix items 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 13 and 14.

For example, as to Appendix item 2 plaintiff asserts in his Table I that the trial judge cast doubt on the validity of the expert's testimony as to the value of lost future earnings by referring to it as "pure speculation". The context of the phrase "pure speculation" was that plaintiff's counsel asked the witness to calculate the plaintiff's lost future earnings by assuming plaintiff would earn $6.00 per hour in the first year, $10.00 per hour in the second year, $15.00 per hour in the third year and so on to a level of $40,000 per year in the tenth year. Defendants objected that such incremental increases were without support in the evidence. In response to that objection, the court stated:

> It seems to me it is pure speculation that in the first year he is going to make $6.00 an hour, in the next year $10.00 an hour and the next year $15.00 an hour. I think that is pure speculation.

(T. K20). Plaintiff also asserts with regard to Appendix item 2 that the trial court revealed his opinion of the plaintiff's earning potential by allowing only testimony of $5.00 an hour to be received. Again, referring to the transcript for the proper context, while the trial court sustained the defendants' objection with regard to assuming incremental increases in the plaintiff's income as being unsupported by the evidence (T. K21-22), the court did allow a calculation based upon $5.00 per

hour, which amount was supported by testimony as to plaintiff's earnings at the time of the accident. Mr. Fjelsted then testified that the present value of future earnings paid on a weekly basis of $200.00 during the plaintiff's 32.1 year life expectancy would be $212,689 (T. K23). Plaintiff's attorney did not attempt to elicit from Mr. Fjelsted any other figures regarding the present value of future earnings based on initial assumptions of other than $5.00 per hour. For this reason, there is no basis to assert that the trial court allowed "only testimony of $5.00."

Similarly, Appendix item 5 is characterized by plaintiff as a sua sponte opinion that one of plaintiff's witnesses, Linda Gummow, a neuropsychologist, was not qualified to render an opinion as to whether Mr. Onyeabor was unconscious at the scene because she was not present. Viewing the court's comments in proper context shows the court's dialogue had nothing to do with Dr. Gummow's qualifications as an expert or the weight to be given to her testimony. The court was only limiting Dr. Gummow's testimony on re-direct to the scope of re-cross. Defendants' re-cross examination of that witness had been limited to the unconsciousness. Plaintiff's re-direct inquiry about "gradation" of consciousness was clearly too broad.

> Q [By Mr. Sykes] What are some of the gradations in loss of consciousness that might apply to someone like Mr. Onyeabor?
>
> MR. STEGALL: The gradation:

> Well, Your Honor, I think she answered the question about what she was told, and we're getting beyond - -
>
> THE COURT: Yes, I think so.
>
> MR. STEGALL: - - beyond that question.
>
> MR. SYKES: Well, I just asked about the gradation. Is that a--
>
> THE COURT: You have had a witness here that talked to him immediately after the accident. And all she knows about whether he experienced any unconsciousness or not is what he told her. She wasn't there, and she's talked to him about it. And she -- that's all I'm going to let her testify to, as to what -- based upon what he told her, her conclusion was as to whether or not he did or did not lose consciousness.
>
> MR. SYKES: Okay. I have no further questions, Your Honor, of this witness.

(T. H28-31).

A review of the other Appendix items enumerated above (1-5, 7-11, 13 and 14) reveal that in the context of the questions, the answers, the objections and the statements by the court with regard to those objections, the trial court was not commenting upon the evidence, but was, rather, ruling upon objections, limiting evidence to which objections had been made, or clarifying testimony which had been given.

In addition, to plaintiff's assertions that the trial court commented on witness' testimony, plaintiff asserts in his Table I that the trial court discredited documentary evidence by making disparaging comments about the use of exhibit notebooks given to jurors at the beginning of the trial and "severely scolded"

counsel in front of the jury (Appendix item 6). The exhibit notebooks referred to consisted of loose-leaf binders each containing approximately seventy-six exhibits; the contents were approximately two and one-half inches thick. One such exhibit notebook was given by plaintiff's counsel to each juror so that reference could be made to specific exhibits as they were admitted. Defendants' counsel opposed the use of the exhibit books prior to and at a hearing on motions in limine on January 30, 1987. At that time, the trial judge expressed his concern that the notebooks contained exhibits which might not be received and would be distracting to the jury. Plaintiff's counsel assured the trial court that the exhibit notebooks could be used without distracting the jury. The trial judge did determine that he would permit plaintiff to use the exhibit notebooks. (T. Q55-59)

Plaintiff's Appendix item 6 relates to control of the use of those exhibit notebooks by the trial court. Earlier in the day during Dr. Soderberg's testimony, reference was made to exhibit number 34, a written report of the CT examination performed on the plaintiff. The interchange between plaintiff's counsel was as follows:

> MR. SYKES: Your Honor, that is in the books. And if it would be okay I'd like to have the jury turn to that for a moment.
>
> JUDGE CROFT: Well, the Doctor's telling them everything that's in it. I think they can follow it. If they want to look at it it's all right.

> JUDGE CROFT: The trouble with them trying to read what's in the exhibit is they might miss the doctor's testimony. And that's what they should hear.

(T. D325)

Shortly thereafter, Dr. Soderberg testified that he had prescribed a cane for the plaintiff; the prescription was received as exhibit number 52 and plaintiff's counsel stated:

> MR. SYKES: I don't know if the jury has that in their books. Could they check quickly?
>
> JUDGE CROFT: Well, it is a prescription for a cane. I don't think it's necessary that they examine it, they will see it in the jury room when they consider the case.
>
> MR. SYKES: Okay.

(T. D333)

Shortly thereafter, plaintiff's counsel made a reference to exhibit 16, which stated in its entirety: "I examined Mr. Onyeabor today. He has no health problems. He should be able to participate in all school activities." At that point, the following interchange occurred:

> MR. SYKES: Okay. If you could turn to exhibit 16 again--and may the jury also, Your Honor, turn to exhibit 16?
>
> JUDGE CROFT: If they wish.

(T. D348)

On redirect examination, Dr. Soderberg was asked to refer to page one of exhibit 51, a four page office chart maintained by

Dr. Soderberg. Again, plaintiff's counsel asked if the jury could refer to the exhibit to which the trial judge replied:

> JUDGE CROFT: If it's helpful. I don't know that they need to look at the book every time the Doctor says something about the exhibit.

(T. D382-383)

The witness following Dr. Soderberg was Dr. Gerald Moress. In redirect examination the doctor was asked to identify an EMG report, exhibit 55. Although not objecting to the receipt of the exhibit, defendants' counsel did object to the line of questions regarding it as being beyond the scope of cross-examination. The trial court permitted Dr. Moress to be questioned concerning the EMG report at which point the following occurred:

> MR. SYKES: May we have the jury turn to that, Your Honor, to 55?
>
> JUDGE CROFT: Why don't you ask him the question and I think the jury can get it easier from what the doctor says than they can trying to read what the book says. And all of you follow what the doctor is saying at the same time.
>
> MR. SYKES: Your Honor, the only reason I do that, I think it would be helpful to see and hear at the same time.
>
> JUDGE CROFT: Okay. Let's have an understanding that any time the jury wants to pick up the book to look at the exhibit that the witness is talking about you are free to do so, if you don't want to you don't have to.
>
> MR. SYKES: Okay. I think it would be helpful in this case, Your Honor.
>
> JUDGE CROFT: I'd going to let them make the decision because they may not find it that way.

(T. D443-44)

It is obvious from this history of events that the trial judge was concerned the use of the exhibit notebooks was becoming distracting to the jury. Nonetheless, after consulting with counsel that evening and the following morning, the trial court did advise the jurors that they should, at the request of plaintiff's counsel, examine the exhibit being testified to. He advised them that when the request was made, the jury was to look at the exhibit being considered, and when that exhibit was no longer needed, to close the exhibit book and not look through it further as there might be exhibits that were not yet in evidence. (T. E491) That procedure was followed by the court for the remainder of the trial. If the jury somehow perceived the trial judge's statements in controlling the use of the notebooks as disparaging, any such perception was cured by his directions on the morning of the fourth day of trial.

The remaining Appendix item (12) in which a claimed direct comment was made occurred during the testimony of Patrick Chukwu. Plaintiff states that the trial judge referred to a Nigerian witness as "these young ones" thus demeaning the witness and other younger Nigerians who had previously testified. Mr. Chukwu was the third of three friends testifying for plaintiff; these witnesses were Emmanuel Uzoh, age thirty-one years, Robert Otti, age thirty years and Mr. Chukwu, age thirty-two years. A review of their testimony reveals that all three witnesses tended to give lengthy narrative responses to specific questions. For some

period prior to the statement by the trial court, Mr. Chukwu was giving long, involved, narrative responses to specific questions. Objections had been made and the witness and plaintiff's counsel had been cautioned with regard to responding to the specific question. A similar problem had occurred during the examination of the two prior witnesses. As a result, the trial judge's statement that the "young ones tend to make a speech" was in fact an accurate statement. The term "young ones" was probably an unfortunate choice of words by the trial judge, but it is certainly stretching to describe the term as "demeaning" to Mr. Chukwu or to the other witnesses.

SUA SPONTE INTERJECTIONS

Plaintiff claims that on approximately twenty-seven occasions during the course of the trial the trial judge commented on the evidence by making sua sponte interjections and interruptions. Portions of the trial transcript containing the claimed comments are designated as items 15 through 35 in the Appendix to petitioner's brief.

A review of those portions of the transcript itself reveal that many of the claimed comments were simply statements made by the trial court properly requesting a witness to respond to the question which was asked. The claimed comments falling within this category are Appendix items 16, 17, 18, 20, 21, 28, 30 and 35.

By way of example, plaintiff asserts with respect to item 16 in Table II that the trial court "interjects comment to help

defense; scolds plaintiff's expert witness." The interchange in question is as follows:

> Q [Mr. Stegall] Were the test scores helpful to him if he told you that he was 580 and, in fact, was 563?
>
> A [Mr. Zelig] I don't think there's a significant difference between the two scores. That's why I didn't pay too much attention to it. I think it would be an easy mistake to make, because they were so close together.
>
> THE COURT: That doesn't quite answer his question, Doctor.
>
> THE WITNESS: I'm sorry. It is not significant to me that there was significance in those two scores.

(T. G95)

Another such example is Appendix item 17 characterized by plaintiff in Table II as the trial court interjecting to help defense and questioning plaintiff's expert on the basis of the expert's opinion. The interchange in question is as follows:

> Q [By Mr. Stegall] Okay. What did Mr. Onyeabor tell you about the jobs he held?
>
> A [By Mr. Heal] He described to me the types of activities he performed in Nigeria. In terms of estimating jobs or working with customers, hiring workers, training workers, securing materials and equipment, and overseeing construction.
>
> Q You took those at face value?
>
> A I suppose. The other information I relied on was - -
>
> THE COURT: Just answer the question. Did you take them at face value? That is the question.

(T. J187)

Substantially all of the remaining claimed comments are, upon examination, revealed to be proper statements by the trial judge to administer in orderly fashion evidence being introduced at trial.

For example, Appendix item 15 is characterized by plaintiff in Table II as the trial judge inviting defendants to object to an expert's qualifications and casting doubt upon the expert's qualifications. A review of the transcript indicates that Dr. Nielson testified very briefly concerning his professional qualifications. (T. D454) In the interchange between the trial judge and counsel complained of by plaintiff, the trial judge clarified Dr. Nielson's qualifications to render opinion testimony as follows:

> JUDGE CROFT: I assume, Mr. Stegall, you are not objecting to lack of qualification testimony?
>
> MR. STEGALL: Your Honor, I understand the gentleman is an ENT specialist and--
>
> JUDGE CROFT: You stipulate he is an expert in that field.
>
> MR. STEGALL: in the field.
>
> JUDGE CROFT: And can testify without further foundation?
>
> MR. STEGALL: In audiology, Your Honor.
>
> JUDGE CROFT: All right, go ahead, Mr. Sykes.

(T. D460)

In Appendix item 19, plaintiff complains that the trial judge made a rude interjection implying that plaintiff's counsel had suggested an answer to the witness. The transcript reveals that plaintiff's counsel had asked a series of leading questions with regard to the calculation of the present value of future payments. (T. K5-7) The interchange between plaintiff's counsel and Mr. Fjelsted preceding the court's statement is as follows:

> Q [By Mr. Sykes] Okay. But just to illustrate the principle of how you arrive at that, what you are arriving at is a discount rate?
>
> A [By Mr. Fjelsted] Correct.
>
> Q Is that rate -- and I indicated earlier my example if you wanted to get $10,000 of income in ten years -- in the tenth year, let's say, and you want to know how much money, now you need to produce that, you have to apply a discount rate?
>
> A Correct.
>
> Q And that's why it is a lesser amount of money?
>
> A That is correct.
>
> Q But you get that discount rate?
>
> THE COURT: Are you asking him or telling him, Mr. Sykes?
>
> MR. SYKES: Well, you get that discount rate by taking the interest rate here minus --
>
> THE COURT: Let him tell you how he does it.
>
> MR. SYKES: All right.

(T. K8-9)

Appendix item 24, is characterized by plaintiff as the trial judge questioning one of plaintiff's experts as to whether he understands certain head injury terms. A review of the transcript (T. E494-497) reveals the plaintiff was seeking the admission of a video tape and a medical glossary. The glossary was to be used by the jury to look up medical terminology used both in the video tape and by the witness. The trial judge suggested that the witness endeavor to use plain English in his testimony rather than have the jury attempt to remember terms and look up those terms in a glossary. (T. E495-96) The following then occurred:

> Q [By Mr. Sykes] Tell us about the film -- Who prepared it, when it was prepared approximately and this sort of thing.
>
> A The film was prepared at the University of Utah approximately, I'd say, about a year ago or within the last year. It is viewed predominently toward, for family members or people that don't understand brain injury and goes over, almost from start to finish, of what happens. It goes over all degrees of brain injury, it describes it and some of the consequences and what happens. And it shows it very vividly. And I think it is a high quality film. Unfortunately, a couple places get a little technical and that's my only problem with it, Your Honor, in one area where they go over the anatomy. There is a neuroanatomist, Dr. Susan Stenson, who is excellent but she uses all the big terms. And I'd be glad to define any at that time if it is necessary.
>
> MR. SYKES: Perhaps--
>
> JUDGE CROFT: Well you understand the terms?

THE WITNESS: Yes, I do, Your Honor.

JUDGE CROFT: If they need explaining you can explain them to the jury, can't you?

THE WITNESS: Yes, I can.

(T. E495-97) (Emphasis added). Defendants' objection to the glossary was sustained; the video film was admitted over defendants' objection and was shown to the jury. (T. E498-99) From the context, it is evident the trial judge assumed the witness was familiar with medical terminology and was clarifying for the jury's benefit the fact the witness could help the jury understand the video without resorting to a glossary.

Appendix item 25 is characterized by the plaintiff as the trial judge questioning a plaintiff's expert about something which "troubled" the trial court regarding the scope of a jury decision to decide the case. A review of the transcript reveals that the court was properly troubled with regard to a statement made by the witness which could have been perceived by the jury as meaning the witness expected the jury to make a specific finding in favor of plaintiff. When asked about his opinion as to whether the plaintiff had compensation syndrome, the following interchange occurred:

A (Dr. Nilsson) Well, his -- the majority of my interactions have not been typical of patients that I have followed who have compensation syndrome in the sense that he is more concerned that the truth be shown, and that he is helped to be more reassured of a good future, of being able to care for his family. He is very angry and he is very frustrated,

> and sees a lot of the court proceeding as an expression of that anger. But the end result being a validation of yes, you are injured and we will help you with your problems.
>
> . . .
>
> [THE COURT:] There was one comment that the doctor made that troubled me just a little bit, and that was that he expected this court to make a decision one way or another with respect to a particular injury. Did I misunderstand you, Doctor?
>
> THE WITNESS: It is not my expectation, Your Honor, no. But yet I think from my experience, head injury patients in general tend to see this as a final confrontation of proof. In fact, I have some patients who totally will verbalize this court will say whether I have a head injury or not. And obviously that is not the case.
>
> THE COURT: Your answer wasn't based upon the assumption that this court or the jury would make any determination on that, I guess; is that right?
>
> THE WITNESS: That's correct.

(T. J38-39) (Emphasis added.)

Appendix item 26 is characterized by plaintiff as the trial court's interjection to unnecessarily restrict redirect examination. Dr. Duncan Wallace, a psychiatrist, had been cross-examined by defendants with regard to the fact that Dr. Wallace was himself a plaintiff in closed-head brain injury litigation. Dr. Linda Gummow, one of plaintiff Onyeabor's witnesses, was also a witness in Dr. Wallace's litigation. On redirect examination, to rehabilitate Dr. Wallace, the witness

was asked to distinguish between his injury and that of Mr. Onyeabor and was then asked about his own impairments. Defendants' objection was overruled. The witness described his impairments and difficulties for several pages of transcript (T. F742-44) at which point the complained of interchange occurred:

> Q (Mr. Sykes) Did you have a drop in I.Q.?
>
> A Probably had about a 10 to 12 point drop.
>
> Q What was your I.Q. before the incident?
>
> JUDGE CROFT: I think that's going a little bit far on it, Mr. Sykes.
>
> MR. SYKES: Well, I would like to know what his I.Q. is now because that does relate to the type of report he may have written here.
>
> MR. STEGALL: I think that gets into a lot of foundational questions we may not be prepared to get into with this witness. And --
>
> MR. SYKES: I will withdraw the question, it's not that important.
>
> JUDGE CROFT: I think he's answered it sufficiently.
>
> MR. SYKES: Okay.

(T. F744-45) (Emphasis added.) Plaintiff is complaining now of testimony his counsel did not feel was important at trial. The witness had testified on direct as to his professional qualifications (T. E650-52) and on redirect as to his own impairments. Inquiry on redirect examination apparently aimed

solely at bolstering the witness' testimony was properly terminated by the court.

Appendix item 27 is characterized by plaintiff as an interjection by the trial judge to attempt to narrow the scope of an answer by one of plaintiff's experts. The transcript reveals the witness was asked as to the number of his patients; the question was ambiguous as to whether it referred to total patients or brain injury patients. The trial judge was attempting to clarify that ambiguity. (T. J8-9)

Appendix item 31 is characterized as the trial judge "hassling" the witness as to the price of repair of his car's left front tire. Two repair invoices (Exhibits 7 and 8) had just been received without objection when the following occurred:

> Q (Mr. Sykes) Mr. Onyeabor, did you tell us how much the amount of money was in the tire -- I don't recall if you said that.
>
> THE COURT: Well, the exhibit speaks for itself. It is about $73,00.
>
> MR. SYKES: Okay.

(T. I 102-03) The trial judge was hardly "hassling" the witness by properly noting that the exhibit just received spoke for itself as to the amount of the tire repair.

Appendix item 32 is characterized as an interjection by the trial judge because he didn't want plaintiff's father-in-law to testify about the fact he was hard of hearing. The transcript reveals that at the close of cross-examination of Mr. Pedersen, plaintiff's father-in-law, plaintiff's counsel initially stated

he had no questions on redirect. The trial judge excused the witness at which point the following occurred:

> MR. SYKES: I do have one other quick question, if I might.
>
> JUDGE CROFT: What is it?
>
> MR. SYKES: Do you have a slight hearing problem?
>
> THE WITNESS: Yes.
>
> MR. SYKES: How long have you had it?
>
> JUDGE CROFT: That doesn't matter.
>
> THE WITNESS: All my life.
>
> JUDGE CROFT: Just a moment.
>
> MR. SYKES: That's all I have, Your Honor.

(T. D311-12) Notwithstanding the statement of plaintiff's counsel that he had one other question, he attempted to ask several which were clearly beyond the scope of cross-examination. The trial judge was attempting to control questions and answers; even so, the question was asked and answered.

Appendix item No. 33 is characterized by plaintiff as an interruption by the trial judge to have evidence admitted before plaintiff's counsel had finished laying the foundation therefor. A review of the transcript (T. D476-77) reflects that plaintiff was seeking the admission of three anatomical drawings (Exhibits 91, 92 and 93); the three exhibits were within the view of the jury as Dr. Goka was asked to explain their relevance. The trial court properly suggested to counsel that the three exhibits be placed into evidence so they could be considered by the jury.

All three exhibits were received without objection by defendants. (T. D477)

Exhibit item 35 is characterized by plaintiff as an unnecessary "scolding" of counsel on an evidentiary matter. The transcript reveals that plaintiff's counsel asked a number of foundational questions with regard to certain medical reports. (T. D455-56) After having the witness identify the various reports but before having them admitted into evidence, plaintiff's counsel asked the witness the results of those tests. At that point, the following interchange occurred:

> JUDGE CROFT: Well, let's get the tests into evidence first, Mr. Sykes.
>
> MR. SYKES: I'd be happy to do that, Your Honor.
>
> JUDGE CROFT: Well lets do it first. That's the proper way to do them. Can you identify those four reports by exhibit numbers?

(T. D456-57) Thereafter, plaintiff's counsel had the various reports marked and identified, all of which were received without objection. It is clearly evident that the trial judge was not "scolding" counsel, but was properly requiring him to follow appropriate procedures prior to questioning the witness concerning the contents of the exhibits.

DEMEANOR OF THE TRIAL JUDGE

Plaintiff contends he was prejudiced by reason of the non-verbal conduct, including facial expressions, tone of voice, sighs and body language of the trial judge.

Plaintiff made no objection during the course of the trial to any non-verbal conduct of the trial judge; this claim was raised by plaintiff for the first time in his motion for a new trial. An allegation of impropriety is not timely raised if it is first presented as a post-trial motion. State v. Barron, 465 S.W.2d 523 at 528 (Mo. 1971); Annau v. Schutte, 96 Idaho 704, 535 P.2d 1095 at 1101 (1975). In Barron, supra, the defendant in a criminal trial asserted in his motion for new trial that during the course of alibi testimony, the trial judge "placed his hands flat to the side of his head, shook his head negatively once, leaned back and swiveled his chair 180° around." Noting that such conduct was not revealed by the record and that there was no other evidence of its occurrence save the verified motion for a new trial, the Supreme Court of Missouri stated:

> However, in any event, at the time appellant asserts this incident occurred, no objection was made and no relief was requested. The alleged action of the trial judge, if it occurred, would have the same effect as a remark or comment by the trial judge, and the rule is concisely stated in State v. McCullough, 411 S.W.2d 79, 81 as follows:
>
> > If a party believes the remarks [by the court] may prejudice his cause, he should object immediately and afford the court an opportunity to correct any erroneous impression, and the issue is not timely presented when raised for the first time in a motion for a new trial. An accused in a criminal case cannot remain silent under the circumstances which appellant asserts here occurred, and thereby gamble on a favorable verdict by permitting the trial to go to conclusion without objection, and then contend for the first time in a motion

> for a new trial that reversible error occurred. [citing cases.]

465 S.W.2d 523 at 528.

This same rule was followed by the Supreme Court of Washington in Egede-Nissen v. Crystal Mountain, Inc., 93 Wash. 2d 127, 606 P.2d 1214 (1980). In that case, the defendant complained of "body language" by the trial court indicating disbelief during the testimony of a number of defendant's witnesses. Although the Washington court's statements in this regard are discussed by petitioner in his brief at pages 7-8, a review of the entire statement by the court is necessary to understand the import of that statement as it relates to objections to the alleged misconduct. The court's statement in full is as follows:

> While the report of proceedings does not reflect contemporaneous objections to such conduct, concurrent objection is not required. Seattle v. Harclaon, 56 Wash. 2d 596, 598, 354 P.2d 928 (1960), concurring opinion of Finley J. Understandably, counsel may be reluctant to note such an objection, particularly in the presence of the jury, and may elect not to object at all if the incidents are only occasional and minor. If, however, the occurrences were as frequent and marked as Crystal Mountain contends, counsel should to object to the court's conduct. Failure to object denies the trial court an opportunity to mitigate the effect of its conduct on the jury, when such conduct has been inadvertent. Manifest error affecting a constitutional right may, of course, be raised at any time. RAP 2.5(a)(3). Timeliness of objection is not an issue in this case because the trial court was sufficiently apprised of the matter in the motion for mistrial. [The motion for new

trial was made approximately one-half way through the trial].

606 P.2d at 1223 (emphasis added).

In this regard, petitioner complains of the trial court's treatment of his exhibit notebooks. As has been noted elsewhere in defendants' brief, the trial judge's statements were made to control the use of the exhibit book which had some potential for abuse. In any event, when the dissatisfaction of plaintiff's counsel with the statement was called to the trial judge's attention, the trial judge modified his earlier ruling with regard to the use of the notebooks. Thus, in the single instance of which there is any indication that Plaintiff's counsel objected to what he considered inappropriate conduct by the trial court, the trial judge immediately took steps to rectify any harm he may have done.

Neither before nor after the off-the-record conference which occurred at the end of the third day of trial, did plaintiff's counsel make any objections to comments, either verbal or non-verbal, by the trial judge.

There is nothing in the record before this court which identifies any specific instances of non-verbal conduct or which specifically describes the conduct or which relates the conduct to any event in the written record. If such conduct was perceived, plaintiff's counsel should have interposed a timely objection thereto so that any perceived problem could be rectified and an appropriate record made. Instead, the plaintiff

first raised complaints concerning the trial judge's conduct in a motion for a new trial.

CONCLUSION

Viewing the specific instances of the comments by and the conduct of the trial judge in the context in which made, there is no support for plaintiff's contention that he was denied a fair trial. Instead, the comments were explanatory and for the purpose of clarifying and limiting testimony to that which was relevant to the issues before the jury. The plaintiff's contentions as to judicial bias were, therefore, without merit and the Court of Appeals properly so held.